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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 219

SAMUEL NEWFIELD, Trustee of the 671 Prospect Avenue Holding Corporation,
Petitioner,
against
EAST RIVER SAVINGS BANK.

BRIEF FOR EAST RIVER SAVINGS BANK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

Since, as the Court below observed (R. 33), the allegations of the petition must be deemed true for the purposes of this application, respondent cannot presently dispute any of the facts presented by petitioner.

Respondent does wish, however, to supply one fact omitted by petitioner. When the Circuit Court of Appeals in its decision reported in 105 Fed. (2d) 960 reversed its prior holding on the identical question reported in 97 Fed. (2d) 513, it based its reversal upon an intervening decision of the Court of Appeals of the State of New York in *East River Savings Bank* v. *671 Prospect Avenue Holding Corporation*, 280 N. Y. 342. The Court of Appeals,

in passing upon the validity of respondent's lien on the chattels in dispute herein under the identical mortgage passed upon in 97 Fed. (2d) 513, strongly implied that no lien existed. This decision was the sole basis for the Circuit Court of Appeals' reversal of its own decision (R. 34) as it had no alternative but to follow the State law on the question presented which had so recently been established with respect to the identical mortgage.

Question Presented

The question before this Court on this application is not fairly put in petitioner's brief (p. 5) for the Court below held that petitioner was entitled to maintain other summary proceedings to recover the chattels or the proceeds of their sale or to maintain a plenary suit for conversion (R. 36). The question presented is as follows:

"May petitioner maintain a summary proceeding to recover unliquidated damages for an alleged conversion or must he proceed by plenary suit?"

ARGUMENT

POINT I

The Trustee in seeking a personal money judgment is attempting to make improper use of a summary proceeding which is a proceeding *in rem*.

A summary proceeding is a device employed by a trustee to recover the assets of a bankrupt's estate. It was designed to facilitate the gathering of such assets and the determination of the validity of liens thereon in order to avoid the waste of the bankrupt's assets in more protracted litigation. Such a proceeding, directed against the assets of the bankrupt estate, is fundamentally a proceeding *in rem*.

In

Murphy v. *Hofman,* 211 U. S. 562, 570, 29 Sup. Ct. 154, 157, 53 L. Ed. 327,

this Court stated:

> "The last two cases cited [*Whitney* v. *Wenman,* 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157; *White* v. *Schloerb,* 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183] proceed upon and establish the principle that when the court of bankruptcy, through the act of its officers, such as referees, receivers or trustees, has taken possession of a *res,* as the property of a bankrupt, it has ancillary jurisdiction to hear and determine the adverse claims of strangers to it, and that its possession cannot be disturbed by the process of another court."

To the same effect is the following statement from the case of *Whitney* v. *Wenman,* 198 U. S. 539, 552, 25 Sup. Ct. 778, 781, 49 L. Ed. 1157:

> "We think the result of these cases is, in view of the broad powers conferred in Section 2 of the bankrupt act, authorizing the bankruptcy court to cause the estate of the bankrupt to be collected, reduced to money and distributed, and to determine controversies in relation thereto and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy, that when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine controversies in relation to the disposition of the same and the extent and character of liens thereon or rights therein."

This concept is found in all of the principal reported cases involving "turn-over" proceedings. For example, in *White* v. *Schloerb,* 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183, it was held that jurisdiction existed to compel a return of the bankrupt's stock of goods to the trustee; in *Babbitt* v. *Dutcher,* 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, summary jurisdiction to recover record books of the

bankrupt was approved; in *May* v. *Henderson,* 268 U. S. 111, 45 Sup. Ct. 456, 69 L. Ed. 870, a credit or a chose in action amounting to $12,000 was returned to the trustee. In all of these cases, this Court has demonstrated the proper function of a summary proceeding to be the recovery of the bankrupt's assets and its proper object to be the *res,* the bankrupt's estate. No case cited by petitioner states the contrary.

The case of

> *In re Reading Engineering, Inc.,* 29 Fed. (2d) (C. C. A. 2) 22,

on which the Court below based its decision, emphasized this *in rem* nature of a summary proceeding. There, the trustee sought to recover the value of certain chattels or the proceeds of their sale. The chattels were still in existence and were still where the bankrupt left them at the time the summary proceeding was instituted. The Court held, in view of such facts, that a summary proceeding was improper and in so doing relied on the rulings of this Court to the effect that the *res* is the primary object of a summary proceeding.

The Court in the *Reading* case, in following this concept, enunciated this rule at page 23:

> "* * * the property belonging to the bankrupt's estate, if it is in existence, and can be identified and turned over to the trustee, should be turned over, rather than the alleged proceeds of such property."

The Court further stated at page 23:

> "* * * appellant Hoisting Company is only responsible, *in a proper proceeding,* for such property as cannot be traced, identified and returned." (Italics added.)

In support of this last statement, the case of

> *In re Rose Shoe Manufacturing Co.*, 168 Fed. 39 (C. C. A. 2),

strongly relied on by petitioner, was cited. In that case the respondent therein had sold certain chattels and had retained the proceeds. The Court required a turnover of such proceeds on the ground that they stood in the place of the chattels and that an order requiring a turnover of such proceeds was equivalent to an order requiring a turnover of the chattels themselves (citing *First National Bank of Chicago* v. *Chicago Title & Trust Co.*, 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051). However, there was no showing there, as there was in the *Reading* case, and as there is in the instant case (R. 7), that the chattels were still in existence, where the bankrupt left them, or could be "traced, identified and returned". Moreover, the trustee in this proceeding does not seek a turnover of the proceeds of the alleged sale and goes so far as to expressly disclaim any desire to the proceeds of the sale (Trustee's Brief, p. 7). The trustee says:

> "A summary proceeding to recover the proceeds would be of little avail to this petitioner since the property was sold privately by the bank and the amount received was far below the actual market value as alleged in the trustee's petition (R. 9)."

The *Reading* case, 29 Fed. (2d) (C. C. A. 2) 22, also considered the case of

> *In re Denson*, 195 Fed. 854 (D. C. N. D. Ala., 1912),

also relied on by petitioner, and stated at page 23 that the case turned on the finding that the property had been mingled with other property and that recovery in kind was impossible. No such fact was present in the *Reading* case, nor is there any such fact present in the instant case since here the chattels can be traced, identified and returned.

The decision in the *Reading* case and the decision which the Court arrived at in the instant case are, it is respectfully submitted, in accord with each other and in accord with the principles enunciated by this Court in *May* v. *Henderson,* supra, despite petitioner's contention that a conflict exists. The Court will recall that in *May* v. *Henderson,* the respondent was directed in a summary proceeding to return to the trustee a credit which had been part of the bankrupt's estate. As was pointed out in the *Reading* case (p. 23) this credit was the *res* itself. The decisions of the Court below in the *Reading* case and in the instant case, both of which hold that a summary proceeding must be directed primarily against the *res,* can under no theory whatever be considered to be in conflict with the decision in *May* v. *Henderson,* where this Court directed the return of the *res* itself. Moreover, the language of this Court in *May* v. *Henderson* concerning the turnover of the value of the property which had been sold, is respected by the Court below since it expressly permits the maintenance of another summary proceeding to recover the chattels or to recover the proceeds of their sale, provided such summary proceeding is designed to recapture the *res* and is not an attempt to recover damages in tort (R. 36).

Petitioner himself recognizes the rule concerning the *in rem* nature of a summary proceeding as he strenuously attempts to come within its terms. He states at page 9 of his brief that he is not seeking "damages for unlawful conversion" (the characterization placed on this proceeding by the Court below), but rather is seeking to recover a so-called "substitute for the *res*". It is submitted that this interpretation of the instant proceeding is erroneous, as an examination of the record will reveal.

The order to show cause refers to an order

> "* * * fixing the damages sustained by the trustee by reason of the improper and unlawful appropriation and use by the East River Savings Bank of the chattels * * *" (R. 3).

The petition prays for an order "fixing the damages" and the payment of "the damages so fixed" (R. 10). The Referee below stated that this proceeding was a motion to "fix the damages" sustained "by reason of the improper and unlawful appropriation and use by the East River Savings Bank of the chattels * * *" (R. 15, 16). The Referee's order (R. 19), the petition for review (R. 22), the certificate of review (R. 25), the District Judge's order (R. 28), and petitioner's own notice of appeal (R. 29), contain the same statement.

The District Judge who held against summary jurisdiction stated:

> "What is here desired is the fixation of damages for the wrongful use and withholding of property of the bankrupt * * *" (R. 27).

Finally the decision of the Court below (R. 35) concludes:

> "What the trustee seeks is an order directing the Bank to pay damages for unlawful conversion of the chattels."

Petitioner's contention that he is not seeking to recover damages, but is seeking to recover the "substitute for the *res*", in the face of this record, is untenable.

The Court will also note that although most of the allegations of the petition are made with great particularity and detail, there is no allegation that petitioner wants the chattels or that petitioner ever demanded their return or, indeed, that he ever made any effort whatsoever to recover them. The obvious fact deducible from this omission is that *petitioner does not want the chattels* even though the trustee may obtain them. Thus, out of the trustee's own papers is the anomaly of his position revealed. He wants a "substitute for the *res*", but not the *res* itself. He wants something to which he is not entitled in place of something to which, admittedly, he is entitled.

POINT II

The decision of the Court below is not in conflict with decisions of this Court or with decisions of any other circuit.

Certiorari is sought on the ground that the decision of the Court below is in conflict not only with the decisions of other circuits, but also with prior decisions of the same circuit. It is submitted that the decision below is completely in accord with the prior decision in the *Reading* case, as indeed it had to be, since the facts in both cases were almost identical, it appearing in the instant case, as in the *Reading* case, that the chattels were in existence and were where the bankrupt left them at the time when this proceeding was instituted (R. 7). The ruling below, as has been demonstrated above, is fully in accord with all of the decisions of this Court which hold that a summary proceeding should be diected against the *res,* and is directly parallel with the ruling in another case relied on by petitioner,

> *In re Times Square Auto Supply Company,* 47 Fed. (2d) 210 (C. C. A. 2).

In that case the *res,* which was a sum of money, was ordered returned in a summary proceeding.

It has already been shown that this ruling is not in any way in dispute with either the case of *In re Rose Shoe Manufacturing Company,* supra, or *In re Denson,* supra, as the opinion in the *Reading* case has correctly pointed out the distinction between these classes of cases. Rather than being in conflict with any of these decisions, the decision of the Court below, following the decision in the *Reading* case, only buttresses the principle that a summary proceeding is to be directed solely against the *res* as long as it is in existence and capable of delivery to the trustee.

Petitioner cites the case of *Commercial Casualty Insurance Company* v. *Williams,* 49 Fed. (2d) 472 (C. C. A. 4), as being in conflict with the decision below. Even a cursory reading of that case will reveal that the controversy there arose in a plenary suit in which title to the chattels was in dispute. The District Judge, after a full trial on the merits, determined that title was vested in the trustee and directed that a reference be held to determine their value. That case had nothing to do with summary proceedings.

POINT III

Respondent did not lose its right to contest the Court's jurisdiction by participating in another summary proceeding concerning the validity of respondent's lien on the chattels.

Petitioner contends that respondent lost its right to object to the jurisdiction of the Court by failing to do so in another proceeding. That proceeding was instituted four years ago, before the occurrences upon which the present application is based took place, to have respondent's asserted lien on the chattels declared void. Nothing else was requested by the trustee at that time. Respondent, therefore, could not contest jurisdiction as the issue involved was the validity of a lien on the *res* (*Whitney* v. *Wenman,* supra). That proceeding resulted in the decisions in 97 Fed. (2d) 513 and 105 Fed. (2d) 960, and the only relief granted was the relief prayed for: respondent's lien was declared void. Thereupon petitioner sought to tack on to the order on mandate a direction that damages be fixed against respondent. This attempt was rejected by the District Judge and the order on mandate, as entered, did not presume to grant petitioner any greater relief than he prayed for.

Further, the two proceedings do not constitute but one proceeding as the trustee urges. Each sought a different

form of relief. The first was a proceeding *in rem,* the second *in personam.* All of the material facts alleged in the petition herein occurred after the first proceeding was brought. The trustee himself treated the instant proceeding as a proceeding *de novo,* as he served the order to show cause on respondent personally and not on the attorneys who appeared for it in the prior proceeding. The Court below and the District Judge found no merit in this contention and even the Referee below stated in regard to this issue:

> " * * * I do not think that their taking part in another proceeding waived their rights in this" (R. 18).

POINT IV

The issues presented in the petition are numerous and respondent will be deprived of important substantive rights if it is not permitted to try these issues in a plenary action.

As stated above, the only question ever raised by petitioner and the only question ever decided was the invalidity of the lien once asserted by respondent. From this premise petitioner leaps to the conclusion that respondent is liable in damages. Just what the damages should be assessed for is not very clear. A reading of the petition shows that petitioner does not want the chattels since he never demanded their return. It also appears that he is not seeking the recovery of the "proceeds" of the alleged sale of the chattels, for he so states in his brief (p. 7). Likewise, petitioner insists that he is not seeking "damages for unlawful conversion of the chattels" (Petitioner's Brief, p. 9).

Petitioner, however, gives point to his summary proceeding by suggesting that respondent is liable on some nebulous "implied contract". The details of this theory are still vague. Nevertheless, it should be quite clear that petitioner wants damages and that he believes that he is entitled to them without further delay. The only issues

now open, according to petitioner's theory of the law, is the amount of damages which respondent must pay him, for the Court will note the statement on page 13 of petitioner's brief to the effect that on the hearing respondent will have full opportunity to contest any proof as to the value of the chattels. Petitioner assumes as established facts that respondent was the possessor of the chattels and unlawfully withheld possession; that respondent used and misappropriated (but did not convert) the chattels and is liable for damages.

But these facts not only have never been determined by any Court, but have never even been presented to any Court for determination. Petitioner has adjudicated them for himself and asks this Court to approve such preadjudication. The process employed in arriving at this conclusion is not apparent, but it was probably by the same process by which respondent is castigated as an "admitted wrongdoer".

It is petitioner who cries to this Court for equity and it is petitioner who decries the decision of the Court below as a "mockery of justice". And yet the equity he seeks is a decision of this Court preadjudicating all of the necessary elements of the tort of conversion in his favor and foreclosing the respondent of the right even to deny these elements. The justice which he demands is that this Court find that the only question now unsettled is the amount of damages, when it has never been determined whether any liability for damages exists.

These strained interpretations of justice and equity are asserted only in an effort to circumvent the force of two important facts:

First: The chattels are still in existence where the bankrupt left them.

Second: The trustee does not want them and never demanded them from respondent or anyone else.

From trustee's failure to recognize the importance of these facts, this "endless litigation" has arisen.

CONCLUSION

The case presents no question meriting certiorari. The petition should be denied.

Respectfully submitted,

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